Supreme Court, U.S.
FILED
AUG 26 1996
OFFICE OF THE CLERK

No. 96-324

In The

Supreme Court of the United States

October Term, 1995

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similary situated,

Petitioners,

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

75 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a fiduciary of a pension plan violated the ERISA duties of loyalty, prudence and diversification by purchasing the cheapest available plan termination annuity from an insurance company disproportionately backed by a single type of highly risky investment – junk bonds – in order to maximize the gain to himself, when the fiduciary both knew and should have known that the insurer was less creditworthy than other available annuity providers.

II. Whether a federal court may disregard a statutory interpretation by the very agency charged with administering the statute, on the ground that promulgation of the interpretation post-dated the underlying events before the court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

REFERENCES TO OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 9

I. The Opinion Of The Fourth Circuit Is In Conflict With The Decisions Of Two Other Courts Of Appeals 10

A. The Decision Of The Fourth Circuit Conflicts With That Of The Third Circuit Regarding The Duty Of Prudence 10

1. The Evidence Presented By Plaintiffs Demonstrating The Imprudence Of An Executive Life Annuity Was Sufficient To Render Summary Judgment Improper 10

2. Plaintiffs' Expert Reports Were By Themselves A Sufficient Basis To Deny Summary Judgment 13

B. The Decision Of The Fourth Circuit Conflicts With That Of The Ninth Circuit Regarding The Duty Of Loyalty 14

C. The Decision Of The Fourth Circuit Conflicts With Those Of Other Circuits In Other Respects 17

TABLE OF CONTENTS – Continued

Page

1. The Duty Of Diversification Prohibits An ERISA Fiduciary From Investing All Plan Assets In An Annuity From A Company Whose Assets Are Concentrated In One Risky Type Of Investment 17

2. ERISA Requires That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Must Disgorge The Unjust Enrichment Regardless Of Any Loss To The Plan 18

II. The Fourth Circuit's Sanctioning Of The District Court's Departure From The Accepted And Usual Course Of Proceedings Calls For An Exercise Of This Court's Supervision 20

A. Plaintiffs Presented Sufficient Evidence Of Genuine Issues Of Material Facts To Render Summary Judgment Improper 20

B. The Court Should Give Deference To The Interpretation Of The Agency Entrusted With Administering The Statute 21

III. Conclusion 24

TABLE OF AUTHORITIES

Page

CASES

Arakelian v. National Western Life Ins. Co., 680 F. Supp. 400 (D.D.C. 1987) 17

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 23

Brock v. Citizens Bank of Clovis, 841 F.2d 344 (10th Cir.), *cert. denied sub nom. Citizens Bank of Clovis v. McLaughlin*, 488 U.S. 829 (1988) 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984) 22

Dardaganis v. Grace Capital, Inc., 889 F.2d 1237 (2d Cir. 1989) 18

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir.), *cert. denied sub nom. Bierwirth v. Donovan*, 459 U.S. 1069 (1982) 15, 16

Fink v. National Savings and Trust Co., 772 F.2d 951 (D.C. Cir. 1985) 11

GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc., 895 F.2d 729 (11th Cir. 1990) 17

Himes v. Shalala, 999 F.2d 684 (2d Cir. 1993) 23

In re Unisys Savings Plan Litigation, 74 F.3d 420, *reh'g denied*, 74 F.3d 420 (3d Cir. 1996), *petition for cert. filed* (May 6, 1996) ..... *passim*

Johnson v. Watts Regulator Co., 63 F.3d 1129 (1st Cir. 1995) 23

Katsaros v. Cody, 744 F.2d 270 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984) 16

TABLE OF AUTHORITIES – Continued

Page

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984), *cert. denied sub nom. Estate of Johnson v. Engle*, 489 U.S. 1078 (1989) 15, 18

M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hospital, Inc., 981 F.2d 160 (4th Cir. 1992), *cert. denied sub nom. Pleasant Valley Hosp. v. M & M. Medical Supplies & Serv.*, 508 U.S. 972 (1993) 21

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992), *cert. denied sub nom. Henss v. Martin*, 506 U.S. 1054 (1993) 16

N.Y. State Teamsters Counsel v. Estate of DePerno, 18 F.3d 179 (2d Cir. 1994) 18

National Broiler Council v. Voss, 44 F.3d 740 (9th Cir. 1994) 23

NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S.Ct. 810 (1995) 22

Pilkington PLC v. Perelman, 72 F.3d 1396 (9th Cir. 1995) 9, 14, 15, 16

Riley v. Murdock, 890 F. Supp. 444 (E.D.N.C. 1995), *aff'd without published opinion*, 83 F.3d 415 (4th Cir. 1996) 1, 7, 8

Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 (8th Cir. 1994) 13

Rust v. Sullivan, 500 U.S. 173 (1991) 22

Stinson v. United States, 508 U.S. 36 (1993) 23

Stowell v. Sec. of Health & Human Services, 3 F.3d 539 (1st Cir. 1993) 22

TABLE OF AUTHORITIES – Continued

Page

Strickland v. Commissioner, Maine Dept. of Human Services, 48 F.3d 12 (1st Cir.), *cert. denied*, 116 S.Ct. 145 (1995) 22

Tilley v. Mead Corp., 490 U.S. 714 (1989) 23

Torrington Extend-A-Care Employee Ass'n v. N.L.R.B., 17 F.3d 580 (2d Cir. 1994) 22

Varity Corp. v. Howe, 116 S.Ct. 1065 (1996) 16, 19

Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994) 9, 12

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §§ 1001, et seq. 9

29 U.S.C.S. § 1103(c) 1

29 U.S.C. § 1104 .....1, 3, 11, 14

29 U.S.C. § 1109(a) 18

29 U.S.C.S. § 1342 1

29 U.S.C.S. § 1344 1

RULES AND REGULATIONS

Department of Labor Interpretative Bulletin No. 95-1, 60 Fed. Reg 12328, 29 C.F.R. § 2509.95-1 (1995) 8, 22

Fed. R. Civ. P. 56 .....3, 20

TABLE OF AUTHORITIES – Continued

Page

OTHER

House Conference Report No. 93-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5084-5085 17

III W. Fratcher, Scott on Trusts § 227.3 (4th ed. 1987) 16

Pension Annuity Protection in Light of The Executive Life Insurance Company Failure: Hearings before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 102nd Cong., Second Sess. Part II (1991) 3

REFERENCES TO OPINIONS BELOW

The opinion of the District Court below is reported at *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1995) (App. 5-41), and was affirmed without published opinion at 83 F.3d 415 (4th Cir. 1996) (App. 1-4).

GROUNDS OF THIS COURT'S JURISDICTION

On April 30, 1996, the Fourth Circuit affirmed *per curiam* the decision of the District Court granting Murdock's motion for summary judgment in *Riley v. Murdock*, 890 F. Supp. 444 (E.D.N.C. 1995) (App. 1-4; App. 5-41). A petition for rehearing and suggestion for rehearing en banc was denied on May 28, 1996 (App. 42-43).

Jurisdiction has been conferred on this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104, which provides:

> **§ 1104. Fiduciary duties**
>
> **(a) Prudent man standard of care.**
>
> (1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so;. . . .

STATEMENT OF THE CASE

Defendant David Murdock, the fiduciary of the Cannon Mills Company retirement plan (the "Plan"), terminated the overfunded Plan shortly after acquiring a controlling interest in Cannon Mills. He then purchased an Executive Life Insurance Company annuity to provide the defined benefits promised under the terminated Plan, and took a "reversion" of all Plan assets remaining after payment of the annuity premium.

In April, 1991, Executive Life failed, in large part because of its heavy investment in junk bonds. The Plan participants' retirement benefits were immediately

slashed by 30 percent.[1] Plaintiffs, who are participants in the Plan, brought this action, challenging Murdock's selection of an Executive Life annuity as a breach of his fiduciary duties under Section 404 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104.

Following discovery, Murdock moved for summary judgment under Fed. R. Civ. P. 56, arguing that there were no genuine issues of material fact and that as a matter of law his choice of Executive Life did not violate his fiduciary duties. In response, Plaintiffs presented substantial evidence by way of documents, expert reports and deposition testimony.

Plaintiffs proffered evidence of the following facts, which they contended were sufficient to establish a triable issue as to whether Murdock breached his duty of prudence by conducting an inadequate investigation and selecting an inappropriate carrier:

- Publicly available information reviewed by Plaintiffs' expert, Professor David F. Babbel, showed that Executive Life's asset portfolio contained an inordinate amount of non-investment grade, "junk" bonds. As much as 60-70% of Executive Life's total assets and 78-91% of its fixed maturity assets consisted of junk bonds. These assets

---

[1] *See Pension Annuity Protection in Light of The Executive Life Insurance Company Failure: Hearings before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging*, 102nd Cong., Second Sess. Part II, at 6 (1991) (statement of Representative Sherwood L. Boehlert) (hereinafter "Hearings").

exhibit considerable default risk. (JA 435-438. *See also* JA 457, 1373).[2]

- The average maturity of Executive Life's bond portfolio was only 8.8 years and therefore poorly matched the Plan obligations, which could last 40 to 50 years. (JA 455).

- Murdock *knew* about the high proportion of junk bonds in Executive Life's portfolio, *knew* that junk bonds were riskier than investment grade bonds, and *understood* that the risk associated with junk bonds made them an unsuitable investment for "a pension plan for widows and orphans." (JA 1601-02, 1638-1640).

- Murdock *knew* that the New York commissioner of insurance had disqualified Executive Life's parent company from doing business in New York. (JA 1639).

- The California Insurance Commissioner had determined that Executive Life was statutorily insolvent in 1984. (JA 300-332, 435, 456).

- The two sources Murdock claimed to have consulted and relied upon both reported significant information which called into question Executive Life's creditworthiness:

    - A.M. Best, whose ratings were inflated, nonetheless reported: that Executive Life had four or more Insurance Regulatory Information Systems (IRIS) ratios outside normal ranges prescribed by the National Association of Insurance Commissioners (NAIC); that Executive Life's reserves were likely underestimated;

---

[2] Factual references are to the Joint Appendix filed in the Court of Appeals.

and that Executive Life was ranked as a Class IX insurer with policyholders' surplus far below that of other insurers under consideration. (JA 456-58).

- Hewitt Associates did not recommend purchasing an annuity from Executive Life, but instead provided a written report to Murdock's Investment Committee which expressed "reservations" about Executive Life, including concerns about Executive Life's lack of experience, negative publicity, short term bond maturities and vulnerability to interest rate fluctuations, as well as the overriding concern about Executive Life's excessive commitment to low-grade junk bonds. (JA 266, 267-270, 278-280, 1387-94, 1582-82, 1588-89, 2043-45).

- Murdock took no steps to monitor Executive Life after the annuity selection. Additional information was disclosed within one year thereafter in the 10-K forms of Executive Life's parent company, which further called Executive Life's creditworthiness into question, e.g., the New York insurance department disallowed $151.5 million worth of reinsurance, and Executive Life was having difficulty in paying promised rates of return. (JA 364, 459-460).

- Plaintiffs' well-qualified experts submitted reports which concluded that the selection of Executive Life was imprudent based upon publicly available information which a reasonable investigation would have revealed. (JA 432-499).

In addition, Plaintiffs submitted evidence of the following facts to support their claim that Murdock breached his duty of loyalty by choosing an annuity

carrier on the basis of price in order to maximize his own reversion:

- Murdock had a conflict of interest in selecting an annuity provider because any cost savings from purchasing a lower cost annuity would be retained by Murdock personally. (JA 366-67, 368, 375, 377-78, 461, 1622).
- Memoranda prepared in connection with the termination of the Plan revealed that Murdock's goals were to "maximize the cash being returned to the Company" and to increase "the dollar value of revertible surplus through the selection of an appropriate annuity vehicle". (JA 367, 376).
- Murdock's Investment Committee member Michael Werner admitted that one of his priorities in connection with the Plan termination was "to preserve the plan assets and to function in coordination with the reversion activities." (JA 1940-41).
- The initial Insurance Carrier Candidate List prepared by Hewitt Associates discussed whether each carrier had been "competitive" recently, a clear reference to price. (JA 259).
- A Hewitt Associates' report expressly stated that price was a "factor[ ] going into the [annuity] selection process." (JA 267).
- Charles McKenzie of Hewitt Associates explained Murdock's company's "focus" on Executive Life by observing that "it would be fairly natural to focus on the company with the low bid." (JA 1587).
- Of eight proposals submitted in the second round of bidding, Murdock only reviewed the three deemed "competitive." (JA 278).

- The proposals which made the second round cut were the three lowest priced bids, and the proposal ultimately selected (Executive Life) was the very cheapest bid. (JA 278-79).

- Murdock, who personally selected the annuity carrier, also personally received the additional $2.5 million saved by the Plan in purchasing the cheapest annuity. (JA 298).

- Ten of the eleven companies on the initial bid list received "A+" ratings from A.M. Best, but Executive Life was one of the few that received negative comments from Hewitt Associates. The record does not reveal any non-price reason for selecting Executive Life ahead of the other carriers or any attempt by Murdock to investigate any other annuity providers. (JA 259).

Notwithstanding the foregoing evidence, the District Court granted summary judgment for Murdock. Holding that "[p]laintiffs have not offered any evidence to support the opinion that Murdock and the committee should have known of any problems at Executive Life in 1986," 890 F. Supp. at 458-59 (App. 35),[3] the Court concluded that Murdock's selection of Executive Life was prudent in view of his reliance on Hewitt Associates and the A.M. Best rating. 890 F. Supp. at 458 (App. 34). The District Court disregarded the information known to Murdock and his advisors, and declined to take into account either the conclusions or the supporting (publicly available) information set forth in the reports of Plaintiffs' experts. 890 F. Supp. at 458-59 (App. 34-35).

---

[3] References to the Appendix accompanying this Petition are cited as "App."

The District Court did not address whether Murdock's selection of Executive Life was based upon price or otherwise motivated by self-interest, but instead rejected Plaintiffs' claims for breach of the duty of loyalty by holding that a fiduciary could "meet the 'exclusive purpose' requirement by satisfying the prudence requirement." 890 F. Supp. at 459 (App. 35). The District Court never addressed whether Murdock had or breached the duty of diversification under ERISA § 404(a)(1)(C).

On appeal, in a short *per curiam* opinion, the Court of Appeals deferred to the decision of the District Court. In addition, because Plaintiffs (presumedly) "received every dollar of benefits to which they were entitled under the Plan" (App. 3), the Court of Appeals failed to consider that Murdock received a profit from purchasing the cheapest available annuity in alleged breach of his fiduciary duties.

The Secretary of Labor, who is responsible for administering Title I of ERISA, participated in the Court of Appeals as *amicus curiae*. The Department of Labor has interpreted ERISA § 404 to require that when an ERISA fiduciary purchases an annuity to provide plan benefits promised in a defined benefit plan, the fiduciary must select the safest available annuity. The Secretary's amicus brief provided the Department's interpretation, which culminated in its promulgation of a regulation codified at 29 C.F.R. § 2509.95-1, to the Court. The Court of Appeals summarily rejected the Department's position without addressing its merit on the ground that its promulgation post-dated Murdock's conduct. (App. 4).

REASONS FOR ALLOWANCE OF THE WRIT

In upholding the decision of the District Court that Murdock's purchase of an Executive Life plan termination annuity did not breach his fiduciary duties under ERISA, the Fourth Circuit placed itself directly in conflict with the Third and the Ninth Circuits, which resolved precisely the same issues in favor of the plan participants. *See In re Unisys Savings Plan Litigation*, 74 F.3d 420, *reh'g denied*, 74 F.3d 420 (3d Cir. 1996), *petition for cert. filed* (May 6, 1996); *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1401 (9th Cir. 1995). *See also Waller v. Blue Cross of California*, 32 F.3d 1337, 1342 (9th Cir. 1994) (a case involving Executive Life issues on a motion under Rule 12(b)(6)). In addition, the Fourth Circuit sanctioned such a departure of the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The issues raised in this Petition arise every time a fiduciary purchases an annuity as a means of distributing retirement benefits to ERISA plan participants. Indeed, the importance of these issues is demonstrated by the participation of the Secretary of Labor, who has primary responsibility for enforcement of Title I of ERISA, 29 U.S.C. §§ 1001, *et seq.*, as *amicus curiae* in the Court of Appeals. The Fourth Circuit's cursory treatment of these important issues and the views of the Secretary of Labor highlight the need for review by this Court.

I. The Opinion Of The Fourth Circuit Is In Conflict With The Decisions Of Two Other Courts Of Appeals.

A. The Decision Of The Fourth Circuit Conflicts With That Of The Third Circuit Regarding The Duty Of Prudence.

1. The Evidence Presented By Plaintiffs Demonstrating The Imprudence Of An Executive Life Annuity Was Sufficient To Render Summary Judgment Improper.

On January 4, 1996, the Third Circuit, in *Unisys*, reviewed the decisional law regarding the duty of prudence in the context of the purchase of guaranteed investment contracts (GICs) from Executive Life. The Executive Life GICs in *Unisys* were purchased by the fiduciary as one part of one of several fund alternatives offered to the participants, who could transfer contributions among funds with relative ease. The facts of *Unisys* contrast from those in the case at bar, where all the Plan assets were invested in an annuity from a single company, which was to provide benefits over a 40-50 year period, and the fiduciary's choice of annuity provider was imposed upon the participants, who thus had no opportunity to transfer funds in or out of the investment. The facts in this case thereby impose a burden on the fiduciary, at least the same as in *Unisys*, and justifiably would support an even greater burden on Murdock.

Significantly, *Unisys* held that the duty of prudence applied to the purchase of Executive Life GICs under the facts of the case. The court reviewed the considerable decisional law describing the duty of prudence, including the duty to conduct an independent investigation into the

merits of a particular investment. *Id.* at 434-36. The court concluded:

> Of course, the thoroughness of a fiduciary's investigation is measured not only by the actions it took in performing it, but by the facts that an adequate evaluation would have uncovered. *Fink [v. National Savings and Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985)] (Scalia, J. concurring in part and dissenting in part) ("[T]he determination of whether an investment was objectively prudent is made on the basis of what the trustee knew *or should have known*; and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate." (emphasis in original)).

Unisys, 74 F.3d at 436.

The following evidence raised genuine issues of material fact to support the *Unisys* plaintiffs' claim that the investment of plan assets in Executive Life GICs violated section 1104(a)(1)(B)'s duty of prudence: the high ratings received by Executive Life had been questioned in financial circles; at least one reputable consultant had strongly recommended against investments in Executive Life annuity contacts; Executive Life's reinsurance practices were under scrutiny by state regulators. *Id.* at 436. Significantly, the Third Circuit concluded that whether a rating was a reliable measure of Executive Life's financial status and whether the fiduciary was capable of using the rating effectively were matters to be decided at trial. *Id.*

Unisys noted additional issues for trial: whether Executive Life was an appropriate choice for GICs of

more than three-years' duration; whether the disparity between the interest rates offered by Executive Life and those offered by other bidders could lead a factfinder to infer that the risk accompanying Executive Life's yields was unacceptably high; and whether the fiduciary was equipped to conduct the GIC bids unassisted. *Id.* at 437. The court also noted that the plaintiffs' expert opinion that the purchase of long-term Executive Life GICs was imprudent was "itself some evidence of Unisys' imprudence, capable of defeating Unisys' motion for summary judgment." *Id.* at 437.

Plaintiffs in this case presented evidence of the same facts that *Unisys* found sufficient to deny summary judgment, and more. However, the District Court ignored the substantial evidence that Murdock knew and should have known about Executive Life's financial instability, despite the fact that he was exercising fiduciary duties at "a critical moment in the life of the plan." *Waller*, 32 F.3d 1342. In addition, the Courts below did not consider Plaintiffs' evidence that rating services rated over 60% of Executive Life's bonds as below investment grade, that Executive Life's high ratings were questioned in financial circles, causing a Hewitt consultant to prepare a report that described the negatives about Executive Life, and that state regulators were questioning Executive Life's reinsurance practices, which had resulted in the New York commissioner of insurance disqualifying Executive Life, a fact of which Murdock was admittedly aware. Significantly, Plaintiffs presented evidence that the rating by A.M. Best was not a reliable measure of Executive

Life's financial status and created genuine issues concerning whether Murdock was capable of using the rating effectively.

Unisys draws heavily on ERISA decisions from other Circuits spanning over a decade. *Unisys*, 74 F.3d at 434. Moreover, *Unisys* comports with the weight of authority that an investigation satisfying the duty of prudence must be more than a "magic wand that [the fiduciaries wave] over the transaction to ensure that their responsibilities are fulfilled." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994). In contrast, the Fourth Circuit opinion fails to cite any authority. This Court should not permit to stand the Fourth Circuit's view of the duty of prudence that falls out of the mainstream.

2. Plaintiffs' Expert Reports Were By Themselves A Sufficient Basis To Deny Summary Judgment.

Unlike the court in *Unisys*, the District Court below cast aside the expert reports offered by the Plaintiffs as "conclusory opinion[s] . . . not supported by evidence." 890 F.Supp. at 458 (App. 35). These expert reports were clearly admissible and cited the ample factual bases for the opinions; each report attached a list of sources. The Courts below inexplicably failed to consider the reports, while similar reports presented in *Unisys* were regarded as some evidence of the fiduciary's imprudence capable of defeating the fiduciary's motion for summary judgment.

This Court should grant the writ to resolve the conflict in the Circuits regarding the duty of prudence.

B. The Decision Of The Fourth Circuit Conflicts With That Of The Ninth Circuit Regarding The Duty Of Loyalty.

The Ninth Circuit on December 27, 1995, held that a record setting forth precisely the same material facts in precisely the same procedural posture as presented in this case raised "serious issues of fact as to the reasonableness of the defendants' conduct." *Pilkington*, 72 F.3d at 1401.[4] In particular, the defendant fiduciaries in *Pilkington* contended that they reasonably relied upon the rating of Standard & Poors and A.M. Best and chose the lowest bidder, the principal argument advanced by Murdock in this case. The court unambiguously rejected this argument:

> Legal authority does not support their contention that a mere ratings scan satisfied their fiduciary duty of loyalty to the plan. . . . In addition, there is evidence that some voices in the insurance industry had expressed misgivings about the soundness of those ratings at the time of the spin-off. ERISA's command to fiduciaries is unequivocal: fiduciaries must act *'solely in the interest* of the participants and beneficiaries' and *'for the exclusive purpose of* providing benefits to participants and their beneficiaries.' 29 U.S.C. § 1104(a)(1)(A)(i) (emphasis added).

---

[4] Thus, the Ninth Circuit reversed the decision of a California district court, which had issued an unpublished decision that was relied upon heavily by Murdock in his briefs in the Courts below.

Pilkington, 72 F.3d at 1401 (citing *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984), *cert. denied sub nom. Estate of Johnson v. Engle*, 489 U.S. 1078 (1989)).

The court also noted the evidence that reversion maximization figured prominently in the fiduciary's plan termination decision. Similar evidence was presented by the Plaintiffs in this case. However, unlike the Fourth Circuit, which failed to address this argument, *Pilkington* made clear that the fiduciaries' conflicts of interest can violate ERISA's loyalty requirement. The Ninth Circuit thus held that because the fiduciary's motivation may have deviated from that mandated by ERISA, summary judgment in favor of the fiduciary was improper. *Pilkington*, 72 F.3d at 1401 (citing *Leigh*, 727 F.2d at 125; *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.), *cert. denied sub nom. Bierwirth v. Donovan*, 459 U.S. 1069 (1982)). Moreover, the Ninth Circuit held that the district court had engaged in fact finding when it held that no evidence had been presented that the fiduciaries were motivated by economic self-interest; summary judgment was not appropriate to resolve this contested issue of fact. *Pilkington*, 72 F.3d at 1402.

Finally, *Pilkington* found it significant that the fiduciaries may have had actual notice of Executive Life's heavy purchase of junk bonds, one factor that contributed to its demise; thus, the fiduciaries may have known of the insecurity of the carrier's investments. *Id.* at 1402. Here, Murdock's knowledge of Executive Life's heavy junk bond holdings and the consequent insecurity of the carrier's investments is undisputed. Here, as in *Pilkington*, Murdock's knowledge of these facts should have rendered summary judgment improper.

The panel did not even analyze the duty of loyalty, much less follow the decisions of other Circuits. To the contrary, the Fourth Circuit simply relied on what it termed the "well-reasoned opinion of the district court" (App. 4), even though the District Court erroneously collapsed the duty of loyalty into the duty of prudence. 890 F. Supp. at 459. The District Court's analysis is clearly incorrect, because the duty of prudence may overlap, but is different from the duty of loyalty. *See Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir. 1992), *cert. denied sub nom. Henss v. Martin*, 506 U.S. 1054 (1993); *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), *cert. denied sub nom. Cody v. Donovan*, 469 U.S. 1072 (1984); *Donovan v. Bierwirth*, 680 F.2d at 271; III W. Fratcher, Scott on Trusts § 227.3 (4th ed. 1987).

In *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), this Court set a high standard of loyalty in noting that "sav[ing] the employer money at the beneficiary's expense, is not to act 'solely in the interest of the participants and beneficiaries.' " *Varity*, 116 S. Ct. at 1065. *Pilkington*'s view of the duty of loyalty comports with the standard set by this Court in *Varity*, and the substantial case law of other circuits. *Pilkington*, 72 F.3d at 1401-02.

In this case, the Fourth Circuit endorsed the District Court's collapsing of the duties of prudence and loyalty, and took a view of fiduciary duties not held by any other Circuit. The Courts below failed to review the decision-making of Murdock with the enhanced level of scrutiny required by Murdock's manifest conflict of interest. In short, the Courts below sanctioned Murdock's purchase of the cheapest available annuity without any evidence that he did any sort of comparative analysis to determine

Executive Life's safety relative to that of other annuity providers.

This Court should grant the writ to resolve the conflicts in the Circuits on the duty of loyalty.

C. The Decision Of The Fourth Circuit Conflicts With Those Of Other Circuits In Other Respects.

There are other conflicts between the decision of the Fourth Circuit below and those of other Circuits which, while less blatant than those concerning the duties of prudence and loyalty, are nonetheless deserving of this Court's attention.

1. The Duty Of Diversification Prohibits An ERISA Fiduciary From Investing All Plan Assets In An Annuity From A Company Whose Assets Are Concentrated In One Risky Type Of Investment.

Plaintiffs argued below that Murdock breached the duty of diversification under ERISA § 404(a)(1)(C) by purchasing an annuity from Executive Life, which had an inordinately high concentration in one type of investment, risky junk bonds. Brief of Appellants at 36-38 (citing House Conference Report No-93-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News at 5084-5085; *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729, 733 (11th Cir. 1990); *Brock v. Citizens Bank of Clovis*, 841 F.2d 344 (10th Cir.), *cert. denied sub nom. Citizens Bank of Clovis v. McLaughlin*, 488 U.S. 829 (1988); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400,

406-07 (D.D.C. 1987). In *Unisys*, the court concluded that the fiduciary's satisfaction of the duty to diversify is properly assessed by examining the concentration of Executive Life investments. *Unisys*, 74 F.3d at 440. The Fourth Circuit, like the District Court below, mischaracterized Plaintiffs' argument and rejected it. Guidance from this Court is needed on the applicability of the duty to diversify to the purchase of plan termination annuities from an insurance company.

2. ERISA Requires That A Fiduciary Who Profits From The Breach Of Fiduciary Duties Must Disgorge The Unjust Enrichment Regardless Of Any Loss To The Plan.

Citing the presumed "fact that [Plaintiff] Riley and her class have received every dollar of benefits to which they were entitled under the Plan," the Fourth Circuit failed to recognize that by breaching his fiduciary duties, Murdock placed the plan participants' defined benefits in jeopardy and shifted to them the risk of any loss of benefits, a risk that Murdock as the fiduciary should have borne. Moreover, the Fourth Circuit placed itself in conflict with the law in other circuits that ERISA clearly contemplates actions against fiduciaries who profit by using trust assets in violation of their ERISA duties, even where the plan beneficiaries do not suffer direct financial loss. *See, e.g., Leigh v. Engle*, 727 F.2d at 122 (discussing ERISA § 409(a), 29 U.S.C. § 1109(a)). *N.Y. State Teamsters Counsel v. Estate of DePerno*, 18 F.3d 179, 183 (2d Cir. 1994); *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1243 (2d Cir. 1989).

The foregoing cases emphasize that this principle is rooted in well-established trust law embodied in ERISA. As discussed at length by this Court in *Varity*, while ERISA's fiduciary standards draw much of their content from the common law of trusts:

> . . . trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection.

116 S. Ct. at 1072. It is inconsistent with this congressional determination to interpret ERISA as offering to plan participants and beneficiaries less protection than that available under the common law of trusts. Yet the Fourth Circuit provided lesser protection in refusing to examine whether Murdock was unjustly enriched by his fiduciary breaches and in failing to place upon Murdock the burden of justifying his actions.

This Court should grant the writ to resolve the conflict created by the decisions of the Courts below, which refused to hold Murdock accountable for gains attributable to his breaches of fiduciary duty.

* * *

Given the authority in the other Circuits, the message sent by the Courts below is clear: ERISA plan participants in the Fourth Circuit do not enjoy the same protections as those in every other Circuit. This Court should grant the writ to assure that ERISA is applied in the same fashion by all federal courts.

II. The Fourth Circuit's Sanctioning of the District Court's Departure From The Accepted And Usual Course Of Proceedings Calls For An Exercise Of This Court's Supervision.

A. Plaintiffs Presented Sufficient Evidence Of Genuine Issues Of Material Facts To Render Summary Judgment Improper.

There are significant facts of record demonstrating the breach of fiduciary duties, many of which were undisputed by Murdock. The undisputed facts include the purchase by Murdock, the plan fiduciary, of the cheapest plan termination annuity from Executive Life, despite his admitted knowledge that Executive Life was disproportionately invested in junk bonds and was disqualified from doing business in the State of New York.

The Fourth Circuit upheld the decision of the District Court and refused Plaintiffs the opportunity to present at trial the overwhelming facts that Murdock breached his duties under ERISA § 404. This result occurred because, even though Plaintiffs were entitled to *de novo* review, the Fourth Circuit ignored the material facts of record and simply, without analysis, adopted the decision of the District Court, which had similarly ignored the facts of record. Rather than analyze the arguments of Plaintiffs, the Fourth Circuit rejected the appeal by simply deferring to the so-called "thorough" opinion of the District Court. In fact, although the District Court wrote a lengthy opinion, it abdicated its responsibility under Rule 56 to analyze the voluminous facts presented by the Plaintiffs.

Plaintiffs did not simply rest on the allegations of their complaint, but amassed and came forward with

substantial evidence creating genuine factual disputes regarding Murdock's liability for breach of fiduciary duties. Plaintiffs more than met their burden as the nonmoving party under Fed. R. Civ. P. 56. A party cannot be denied a trial simply because the court deciding summary judgment motions chooses to ignore the evidence brought forward by the nonmoving party.

Another serious departure from judicial norms was the District Court's rejection of Plaintiffs' expert testimony, contrary to the law of the Circuit, a matter ignored by the Court of Appeals. *See M & M Medical Supplies & Serv., Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 166 (4th Cir. 1992), *cert. denied sub nom. Pleasant Valley Hosp. v. M & M Medical Supplies & Serv.*, 508 U.S. 972 (1993). As discussed at page 12, *supra*, such expert opinions were the basis for denying summary judgment in *Unisys*. Given the factual support for the experts' opinions and the absence of any challenge to their qualifications, those opinions should have been considered.

On this record, summary judgment was wholly improper. This Court should grant the writ to assure that proper standards of summary judgment are employed by the federal courts in order that plan participants in the Fourth Circuit are afforded the protections mandated by Congress in ERISA.

B. The Court Should Give Deference To The Interpretation Of The Agency Entrusted With Administering The Statute.

In his Brief as *Amicus Curiae* in the Fourth Circuit, the Secretary of Labor provided his interpretation of the duty

of loyalty. As interpreted by the Secretary, when a fiduciary selects an annuity to cover a pension plan's obligations after plan termination, the duty of loyalty requires that the fiduciary seek the safest available annuity to assure payment of the benefits which the plan promised to its participants. *See* Department of Labor Interpretative Bulletin No. 95-1 ("IB 95-1"), 60 Fed. Reg. 12328, 12330 (1995) (codified at 29 C.F.R. Part 2509.95-1 (1995)). *See also Hearings* at 15, 19 (Statement of David George Ball, Assistant Secretary, Pension and Welfare Benefits, U.S. Department of Labor).

A federal court must accept the construction of an act by the federal agency charged with their administration. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, *reh'g denied*, 468 U.S. 1227 (1984). *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810 (1995). Even where an agency's interpretation represents a "sharp break" with prior interpretations, it is entitled to deference. *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (quoting *Chevron*, 467 U.S. at 862). Accordingly, other Circuits give "ample latitude" to interpretations of statutes by the agency charged with its administration. *See, e.g., Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 18 (1st Cir.), *cert. denied*, 116 S. Ct. 145 (1995); *Torrington Extend-A-Care Employee Ass'n v. N.L.R.B.*, 17 F.3d 580, 589 (2d Cir. 1994); *Stowell v. Sec. of Health & Human Services*, 3 F.3d 539, 544 (1st Cir. 1993) (modification of agency interpretation ordinarily retains its entitlement to deference).

Of course here, the "safest available annuity" standard promulgated in the Department of Labor's regulation and discussed in the Secretary's *amicus curiae* brief

did not represent a sharp break from its prior interpretation, but rather is simply a codification of its longstanding interpretation of ERISA. In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held that an agency's commentary on its promulgated guidelines "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 508 U.S. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). *Cf. Tilley v. Mead Corp.*, 490 U.S. 714, 726 (1989) ("For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA would be to 'embar[k] upon a voyage without a compass.' ") (brackets in original).

Even when such commentary conflicts with prior judicial construction, it is binding on the federal courts. *Stinson*, 508 U.S. at 46. The Ninth Circuit understands that *Stinson* and *Rust* require the federal courts to give deference not only to agency interpretations of its regulations, but also to the agency's *amicus curiae* brief where the brief reaffirms its interpretation of its regulations. *National Broiler Council v. Voss*, 44 F.3d 740, 747 (9th Cir. 1994). *See also Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995) (deference to Department of Labor's interpretation of ERISA regulations); *Himes v. Shalala*, 999 F.2d 684, 690 (2d Cir. 1993) (agency interpretation of all sections of statute entitled to deference).

The Fourth Circuit below refused even to consider the Secretary's interpretation, let alone give it any deference, thus warranting review by this Court. This Court should grant the writ to accord the Secretary of Labor the deference due to his regulation interpreting ERISA on the

important issue of fiduciary duties in the purchase of a plan termination annuity.

III. Conclusion

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

THOMAS W. HENDERSON
(Counsel of Record)
4680 USX Tower
600 Grant Street
Pittsburgh, PA 15219
412-471-9382

TYBE ANN BRETT
835 Chalmers Place
Pittsburgh, PA 15243
412-341-3813

NORMAN P. STEIN
101 Paul Bryant Drive East
Tuscaloosa, AL 35487-0382
205-348-1136

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION; CABARRUS BANK & TRUST COMPANY, Trustee,

Defendants-Appellees,

and

FIELDCREST CANNON MILLS, INCORPORATED; CHARLES A. CANNON, Charitable Trust Number One; CHARLES A. CANNON, Charitable Trust Number Two; CHARLES A. CANNON, Charitable Trust Number Three; CANNON FOUNDATION, INCORPORATED; TRUST UNDER THE WILL OF CHARLES A. CANNON; WILLIAM C. CANNON,

No. 95-2414

Estate of the foregoing, individually and as a trustee; GEORGE A. BATTE, JR., individually and as a trustee; J. HARRIS CANNON, individually and as a trustee; OTTO G. STOLZ, individually and as a trustee; HAROLD P. HORNADAY; DONALD S. HOLT, Estate of the foregoing; ANDREW W. ADAMS; ALBERT M. ALLRAN; JOSEPH C. RIDENHOUR; HUBERT J. TAME; JAMES R. JOLLY; FIRST UNION NATIONAL BANK, Trustee,

Defendants.

SECRETARY OF LABOR,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Court Judge.
(CA-92-442-5-BR)

Argued: April 1, 1996

Decided: April 30, 1996

Before WIDENER, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellant Johnsie Riley, a class representative for former employees of Cannon Mills Corporation (Cannon), participated in Cannon's Retirement Plan (the Plan). Riley asserts that Appellees, David Murdock and affiliated entities (collectively, Murdock), violated various provisions of the Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp.1995) (ERISA), arising out of the amendment and termination of the Plan. The gravamen of Riley's suit is that Murdock breached his fiduciary duties in purchasing a group annuity contract from Executive Life Insurance Company, which administered the Plan but ultimately went into conservatorship, and that Murdock failed to monitor the financial integrity of Executive Life subsequent to purchasing the annuity. In a thorough, published opinion, the district court addressed all of Riley's claims and granted summary judgment in favor of Murdock regarding all claims pertinent to this appeal. *See Riley v. Murdock*, 890 F.Supp. 444 (E.D.N.C.1995).

Before us, Riley advances the same arguments that proved unsuccessful in the district court. Despite the fact that Riley and her class have received every dollar of benefits to which they were entitled under the Plan, Riley appeals, specifically positing that Murdock breached his fiduciary duties in three ways: (1) he violated the exclusive purpose requirement of 29 U.S.C.A. § 1104(a)(1)(A) by purchasing the cheapest available annuity; (2) he violated the prudence requirement of 29 U.S.C.A. § 1104(a)(1)(B) because he knew or should have known

that Executive Life did not or would not enjoy financial integrity and by failing to monitor Executive Life's financial health; and (3) he violated the diversification requirement of 29 U.S.C.A. § 1104(a)(1)(C) by investing in a single termination policy.

Additionally, the Department of Labor (DOL) intervened in this appeal, urging us to adopt a standard that an ERISA fiduciary *must select* the *safest* available annuity to assure payment of the benefits that a plan promises to its participants. In urging adoption of this standard, the DOL relies on its Interpretative Bulletin 95-1, *see* 60 Fed.Reg. 12,328, 12,330 (1995) (to be codified at 29 C.F.R. § 2509.95-1), which was published approximately three months prior to the district court's judgment and well after the events at issue.

We have carefully examined the record, the briefs, the parties' oral arguments, and the applicable law, and we affirm the grant of summary judgment in Murdock's favor based on the well-reasoned opinion of the district court. Regarding adoption of "the safest available" standard urged by the DOL, no federal court has adopted such a standard, and the circumstances of this case do not merit application of such a demanding standard.

AFFIRMED

Johnsie RILEY, et al., Plaintiffs,

v.

David H. MURDOCK, et al., Defendants.

No. 92-442-CV-5-BR.

United States District Court,
E.D. North Carolina,
Western Division.

June 13, 1995.

ORDER

BRITT, District Judge.

This matter is before the court on motions for summary judgment filed by the following defendants: (1) Fieldcrest Cannon, Inc. (Fieldcrest); (2) Otto Stolz (Stolz); (3) George A. Batte, Jr., Estate of J. Harris Cannon, Harold P. Hornaday, Andrew W. Adams, Joseph C. Ridenhour, Hubert J. Toumey and James R. Jolly (the Directors); and (4) David H. Murdock (Murdock). All motions have been extensively briefed and are now ripe for decision.

I. FACTS

The rather complicated and involved facts surrounding this matter are extensively set out in an Order of this court dated 30 July 1993 and repeating them here is not necessary. However, a brief sketch of the relevant events leading up to the motions at bar would facilitate a more complete understanding of the discussion to follow.

This action is brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

§ 1001, *et seq.*[1] Plaintiffs are employees or retirees of Cannon Mills, Inc. (Cannon) and are participants in Cannon's retirement plan (the Plan). They allege that the defendants breached their fiduciary duty by failing to prudently manage the Plan for the benefit of its participants. Specifically, plaintiffs challenge the seizure of surplus plan assets and the purchase of an annuity backed by junk bonds to increase the dollar amount of the surplus.

Cannon has had several different retirement plans over its many years in operation. Until 1979, the employees contributed to the Plan. For the purposes of this matter, this has become known as the 1976 Plan. In 1979, the 1976 Plan was amended by eliminating employee contributions and altering the termination clause to specifically provide that any surplus assets at termination would revert to the employer rather than the plan participants. This will be referred to as the 1979 Plan.

Approximately six months after this amendment, defendant Murdock began purchasing substantial amounts of Cannon stock and in 1982, bought Cannon outright. Plaintiffs allege that in December 1985 Murdock caused the 1979 Plan to be amended to provide for the reversion of the surplus assets to one of his corporations and the purchase of an annuity upon termination of the

---

[1] The original complaint also contained pendent state law claims for common law fraud and conspiracy which were dismissed by this court in its 30 July 1993 Order. 828 F.Supp. 1215.

Plan. The Plan was allegedly terminated on 18 December 1985.

In June 1986 defendant Fieldcrest merged with Cannon. On 2 July 1986, an annuity was purchased to fund obligations to participants of Cannon's terminated retirement plan. The purchase was negotiated by both Murdock and Fieldcrest. Ultimately, the company issuing the annuity went into receivership, and plaintiffs contend that they have suffered as a result. In sum, plaintiffs allege that the entire series of transactions described above was an elaborate scheme orchestrated in violation of ERISA to allow Fieldcrest to buy Cannon at a reduced price and made it possible for Murdock to receive the surplus assets upon termination of the 1979 Plan.

II. DISCUSSION

Summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The United States Supreme Court has written:

> In our view, the plain language of rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the absence of an element to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The Fourth Circuit has recently commented on *Celotex* and firmly agreed with

the concept that the party moving for summary judgment does not have to produce evidence, but can prevail on summary judgment by simply arguing that there is an absence of evidence by which the nonmovant can prove its case. *See Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1254, 131 L.Ed.2d 135 (1995). Each of the four motions for summary judgment will be analyzed pursuant to the above-stated and well-established rules of law.

A. Fieldcrest's Motion for Summary Judgment

Plaintiffs allege that Fieldcrest had fiduciary duties pursuant to 29 U.S.C. § 1002(21) by virtue of the authority and responsibility it assumed under Section 4.03 of the Stock Purchase Agreement dated 3 December 1985 and the fact that Fieldcrest assumed responsibility for the administration of the Plan. Plaintiffs assert that Fieldcrest violated these duties and conspired with other defendants to do so. Plaintiffs admit that Fieldcrest did not receive any of the surplus assets upon termination of the Plan; however, they maintain that the purchase price Fieldcrest paid to acquire Cannon is less than it would have been if Fieldcrest had not allowed Murdock to keep the Plan, amend the Plan in order to allow the surplus to revert to Murdock, and agree to the purchase of an imprudent annuity.

Fieldcrest maintains that it was never a fiduciary under ERISA. It further asserts that it never participated in the administration of the Plan, never attempted to and did not purchase the Plan, and had no involvement in the

termination of the Plan or the purchase of the annuity from Executive Life.

A person or entity is a fiduciary with respect to an ERISA-governed plan:

> To the extent (i) he [or it] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he [or it] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he [or it] has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

29 U.S.C.A. § 1002(21)(A). Subsection (ii) is not at issue; however, plaintiffs argue that Fieldcrest had discretionary authority over the Plan pursuant to the Stock Purchase Agreement and that it actually exercised discretionary authority over the disposition of Plan assets by its involvement in the purchase of the Executive Life annuity.

As explained above, on a motion for summary judgment a defendant does not have to prove an absence of evidence to support a plaintiff's case because the burden rests with the plaintiff to support all elements of its claim. As the discussion below will make evident, plaintiffs are unable to satisfy the burden with respect to proving Fieldcrest had a fiduciary duty under ERISA.

1. Fiduciary Duty Under § 1002(21)(A)(iii)

Plaintiffs assert that the language of the Stock Purchase Agreement entered into by Cannon and Fieldcrest gave Fieldcrest discretionary authority and responsibility with respect to the Cannon Plan, and thus, a fiduciary duty under ERISA. The relevant portion of the Stock Purchase Agreement at issue is Section 4.03 addressing employee benefit plans. By its own terms, Section 4.03 permits either the Sellers' (defined in the agreement as Pacific Holding Corporation and Cannon Holding Corporation) adoption of a new pension plan or the purchase of annuity under guidelines set forth in a separate document known as Schedule 4.03. The option of purchasing an annuity was chosen and subparagraph (e) of Schedule 4.03 addresses that. Schedule 4.03 provides, in pertinent part:

> Seller may, in its sole discretion, provide for the funding of all accrued benefits, including all ancillary benefits, whether or not vested, accrued through December 28, 1985, by causing the purchase of annuity contracts satisfactory to the Pension Benefit Guaranty Corporation.

Plaintiffs contend that the last phrase quoted above automatically makes Fieldcrest a fiduciary and vested it with discretionary authority over plan administration under ERISA's definition of fiduciary.

The plain language of the Stock Purchase Agreement, however, makes it clear that Schedule 4.03 was intended to modify Section 4.03 and that Schedule 4.03 was drafted to "set forth the rights and duties of the parties" regarding any annuities. (Tennyson Dep. at 19-20). There is no

language in any of the agreements requiring Fieldcrest to approve any annuity contracts.

Further, there is testimony, in affidavit form, that Peter Tennyson, the primary legal representative and negotiator for David Murdock, did not intend for any of the provisions to require Fieldcrest to approve any annuity that might be selected. *Id.* at 32-33. Joe Ely, Fieldcrest's Chairman and a principle negotiator for the Cannon purchase, also stated that the Stock Purchase Agreement was not intended to require Fieldcrest's approval of any annuities. (Ely Dep. at 34-35). None of Fieldcrest's personnel responsible for pension matters were involved in drafting the Stock Purchase Agreement nor were they operating under the belief that Fieldcrest had any control over annuity selection. (Midgley Dep. at 21; Mitchell Dep. at 61; Raines Dep. at 15.) As well, testimony of the individuals involved in the negotiations indicates that annuities were never even discussed and that Fieldcrest wanted Cannon to take responsibility for any pension plan. (Murdock Dep. at 506; Tennyson Dep. at 18-19). There is, however, evidence that mention was made of terminating the Cannon pension plan and that Ely expressed concern that Cannon Plan participants be treated fairly. (Murdock Dep. at 506; Tennyson Dep., at 24.) Such concern for the general fair treatment of Cannon employees cannot be said to rise to the level of assuming discretionary authority over the administration of the Cannon plan.

2. *Fiduciary Duty Under § 1002(21)(A)(i)*

Plaintiffs also contend that Fieldcrest owed them a duty as a fiduciary under 29 U.S.C. § 1002(21)(A)(i) in

that Fieldcrest assumed discretionary authority and control regarding plan management and distribution of plan assets. Plaintiff's [sic] primary contention is that Fieldcrest participated in the selection of the annuity. Through depositions, Murdock and others involved in the stock sale have testified that Fieldcrest had nothing to do with the decision to purchase the annuities, the selection of Executive Life, or the termination of the Cannon plan. (Murdock Dep. at 524-25; Tatom Dep. at 50; Ely Dep. at 35.)

The only evidence that Fieldcrest participated in the selection of Executive Life is in plaintiff's [sic] unsworn answers to interrogatories where it is suggested that Fieldcrest was involved in placing Executive Life on the annuity bid list and promised to give Executive Life preferential treatment. The affidavit of Eric Watts, a principal in the firm whose function it was to market Executive Life's annuities, contradicts the suggestion of any special treatment offered by Fieldcrest. (Watts Aff. para. 9.) Watts' statements are corroborated by the deposition testimony of Steven Schwartz, an employee of First Annuity Corporation. (Schwartz Dep. at 165-66.)

The court is somewhat concerned with a meeting that took place on 19 June 1990 and was attended by representatives of Fieldcrest, Executive Life and Murdock. Plaintiffs assert that this meeting is evidence that Fieldcrest was involved in the selection of Executive Life. Defendants deposed six of the representatives in attendance at the meeting and none of them testified that the selection

of Executive Life as an annuity carrier was discussed.[2] Instead, the meeting focused on administrative matters relating to the communication of information concerning benefits to be paid to Cannon employees. (Wilson Dep. at 15-25; Ellis Dep. at 7-12.) Defendants have also provided testimony of those not present at the 19 June meeting that Fieldcrest helped transmit data regarding benefits of individual Cannon employees and that the 19 June meeting was held in order to facilitate the transmission of such information. (Werner Dep. at 95, 107, 293; Tennyson Dep. at 35.)

Plaintiffs assert that the limited activity of transferring of information is enough to constitute the assumption of a fiduciary duty by Fieldcrest. However, the general rule is that an administrator who merely carries out ministerial duties or processes claims does not exercise discretionary powers and is not an ERISA fiduciary. *See Kyle Rys., Inc. v. Pacific Admin. Servs., Inc.*, 990 F.2d 513 (9th Cir.1993); *Pohl v. National Ben. Consultants, Inc.*, 956 F.2d 126 (7th Cir.1992). As long as the ultimate decision regarding the denial of claims or the eligibility for benefits rests with someone else, the administrator has no fiduciary duty. *See Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288 (11th Cir.1989).

Fieldcrest did assist Cannon in transmitting data concerning former Cannon employees and the amount of benefits owed them; however, there is no evidence that Fieldcrest's involvement went beyond the ministerial task

---

[2] Jim Tatom, Alex Yielding, Steven Schwartz, Charles Wilson, Raven Ellis and Nancy Bateman were the attendees of the meeting that were deposed.

of relaying data. There is no evidence that Fieldcrest ever made determinations of the eligibility of Cannon employees under the old Cannon Plan. Therefore, Fieldcrest did not assume any fiduciary duty with respect to the administration of the Plan.

3. *Successor Liability*

Plaintiff's [sic] Third Amended Complaint alleges that Fieldcrest is a successor to the liabilities of Cannon. As a legal principle, Fieldcrest may be held liable as a result of its merger with Cannon; however, plaintiffs have failed to present to the court any evidence that Cannon was liable under ERISA. The only acts that could possibly form the basis of Cannon's liability, and thereby Fieldcrest's successor liability, are based on the 1979 amendment to the 1976 Cannon Plan. In order to establish Cannon's ERISA liability, plaintiffs must show that Cannon, as the employer at the time of the amendment, breached a fiduciary duty owed to plaintiffs. Employers do not owe plan participants a fiduciary duty when they make business decisions, but only when they take action in their capacity as plan administrators. *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir.1985), *cert. dismissed*, 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986), *overruled on other grounds by Mead Corp. v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989). Many courts have held that an employer does not act as an ERISA fiduciary in deciding to amend or terminate a plan. *See, e.g., Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir.1992); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir.1990). The actions of which plaintiffs complain

were all taken by Cannon in the course of its normal business operation and, therefore, do not subject Cannon to ERISA liability.[3] Logically, therefore, Fieldcrest cannot be subject to successor liability for Cannon's actions.

Plaintiffs have failed to establish a genuine issue of material fact concerning Fieldcrest's responsibilities as a fiduciary under ERISA and the existence of successor liability. As concluded above, Fieldcrest did not assume any fiduciary duty under the meaning given that term in 29 U.S.C. § 1002(21)(A). Further, because Cannon was not liable under ERISA, Fieldcrest cannot be held liable as a successor. Therefore, defendant Fieldcrest is entitled to judgment as a matter of law on all claims against it and Fieldcrest's motion for summary judgment will be allowed.

B. Otto Stolz's Motion for Summary Judgment

Stolz is a former officer and director of Cannon who left the company in May 1982. Plaintiffs claim that Stolz: (1) breached his fiduciary duty under ERISA; (2) violated ERISA's "prohibited transaction" rule; (3) violated ERISA rules relating to the distribution of assets upon plan termination; and (4) violated ERISA rules prohibiting employers from firing or harassing employees to prevent those employees from claiming vested pension rights. The first and third allegations arise out of the 1979 Amendment to Cannon's retirement plan and will be discussed together. The second allegation will be fully

---

[3] This matter is more fully discussed with regard to Otto G. Stolz's motion for summary judgment.

discussed in the portion of this order relating to plaintiffs' claims against defendant Murdock, but will be briefly mentioned below. The fourth claim will be discussed independently below.

1. Breach of Fiduciary Duty

Plaintiffs claim that Stolz was involved in the breach of duties owed them with respect to the allegedly improper 1979 Amendment to the 1976 Plan, the promises made them in the Summary Plan Description (SPD), and in general through his activities as an officer and director of Cannon.

a. Fiduciary Duty Under the 1979 Amendment

Plaintiffs' breach of fiduciary duty claims against Stolz are based on allegations that the terms of the 1976 Plan prohibited the 1979 Amendment to the Plan. Specifically, plaintiffs claim that the 1979 Amendment permitting surplus assets to revert to the sponsor on termination was in violation of Articles 7 through 10 of the 1976 Plan. The provisions of each of these articles must be examined. Article 7 contains several sections relating to Plan contributions and payments. Section 7.2 requires Cannon to make sufficient contributions to pay benefits, but does not address the issue of who would receive any surplus assets. Section 7.3 requires all contributions to be paid into a trust fund unless expressly provided otherwise in the Plan. Section 7.5 states that plan participants have rights only to their benefits and does not give them any rights to any surplus upon termination. This section

serves to protect participants' rights to their benefits and cannot be interpreted to afford them any rights to any surplus.

Section 8.1 of Article 8 sets out the statutory fiduciary duties as articulated in § 404(a)(1) of ERISA and names the fiduciaries.[4] These duties are in no way implicated when a plan sponsor takes possession of surplus assets upon termination. *See Wilson v. Bluefield Supply Co.*, 819 F.2d 457 (4th Cir.1987). Section 8.3 discussed the Retirement Committee and establishes the administrative duties of this body. Article 9 deals only with contribution and requires all contributions to be paid to the trustee and kept in the trust fund. It also contains language limiting a participant's rights to the Trust Fund to the amount of benefits actually owed that individual. There is simply no language in Article 8 or 9 that would prevent amendment of the Plan to allow the sponsor to receive surplus assets upon termination.

Article 10 contains sections specifically dealing with procedures for amending the Plan. Section 10.1, entitled "Amendment," allows Cannon's Board of Directors to amend the Plan as long as the amendment does not divert assets "to purposes other than for the exclusive benefit of Participants, Eligible Spouses or Beneficiaries" or does not reduce the amount of benefits to which a beneficiary or participant was entitled prior to the effective date of the amendment. Article 10 contains no language prohibiting the 1979 Amendment.

---

[4] Stolz is not named as a fiduciary.

The provision of the 1979 Amendment at issue is found in Section 11.05 of the 1979 Plan and is entitled "Termination Distribution." It is similar to the corresponding provision in the 1976 Plan in that it does not confer upon plan participants the right to any surplus assets upon termination; however, it differs in that § 11.05 specifies that any such surplus will be returned to the company. Plaintiffs have failed to present the court with any facts that the Plan was not amended in accordance with its own terms. The Fourth Circuit has held that abiding by the terms of a plan cannot be a breach of fiduciary duty. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 493 U.S. 919, 110 S.Ct. 281, 107 L.Ed.2d 261 (1989). This change does not have an adverse or prohibited effect on the rights guaranteed to the participants under either the 1976 or 1979 Plan. The 1976 Plan never gave the participants the right to any surplus, so the change in the 1979 Plan giving any such surplus to the company did not serve to take any benefits from the participants.

Plaintiffs contend that the 1976 Plan language, even if it does not specifically prohibit the company from recovering surplus assets, does prohibit such recovery because the Plan was intended to provide benefits for its participants. The Fourth Circuit has held that a plan sponsor may amend a plan to add provisions allowing the company to recover surplus assets even when unambiguous plan language requires all actions to be in the exclusive interest of the beneficiaries. *Wilson*, 819 F.2d at 460. Additionally, the 1976 Plan differs from the one at issue in *Wilson* in that the §§ 7.3, 7.5 and 9.2 make it clear that participants' rights are limited only to the amount of their

accrued benefits and the *Wilson* Plan contained no such language. Plaintiffs' reliance on the "exclusive benefit" language in the 1976 Plan is misplaced in light of Fourth Circuit precedent and opinions from other circuits. *See id.; Chait v. Bernstein,* 835 F.2d 1017 (3rd Cir.1987) (rejecting prohibition of plan amendment based on "exclusive benefit" argument); *Outzen v. FDIC ex rel. State Examiner of Banks,* 948 F.2d 1184 (10th Cir.1991) ("exclusive benefit" language does not prohibit reversion of surplus assets to sponsor).

b. Fiduciary Duty under the SPD

Plaintiffs also claim that the 1979 amendment was improper in that it was contrary to representations made to them in the 1976 SPD indicating that assets would be distributed only for their benefit.[5] Provisions contained in a SPD are not binding on an ERISA sponsor and cannot serve to amend a plan in any way. *See Elmore v. Cone Mills Corp.,* 23 F.3d 855 (4th Cir.1994) (en banc) (promised benefits are incorporated in a plan only after formal amendment procedures followed). However, if a SPD contains language inconsistent with that of a plan and a participant detrimentally relies on the promises of the SPD, the courts have recognized a federal common-law cause of action. *Aiken v. Policy Management Sys. Corp.,* 13 F.3d 138 (4th Cir.1993). In *Aiken,* plaintiff claimed the

---

[5] Stolz maintains that he had no involvement at all in the preparation of the 1976 SPD, as it was prepared and distributed before he went to work at Cannon. (Stolz Aff. para. 5.) However, in an effort to fully address plaintiffs' allegations, the claims against Stolz as they relate to the SPD will be fully discussed.

right to a distribution based on SPD statements and defendant alleged it had the right to withhold the payment until plaintiff reached a certain age. The court held that in order to recover, plaintiff had to show significant reliance upon or prejudice caused by the SPD. *Id.* at 141; *see also Fuller v. FMC Corp.*, 4 F.3d 255 (4th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1062, 127 L.Ed.2d 382 (1994) (participant may only receive benefits based on SPD if can show reliance on SPD language and prejudice); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1442, 131 L.Ed.2d 321 (1995) (court will not infer detrimental reliance or prejudice without affirmative evidence).

Plaintiffs have failed to show the court any reliance upon the 1976 SPD. Plaintiff Johnsie Riley admitted that she read only parts of the SPD, cannot remember the details of the SPD, and did nothing differently as a result of reading it. (Johnsie Riley Dep. at 28, 133-34.) Her husband stated that he never read the booklet containing the 1976 SPD. (John Riley Dep. at 13.) Virginia Harrington testified that she real [sic] only "part" of the 1976 SPD (V. Harrington Dep. at 13), and her husband, Dewey Harrington said that he "didn't ever look at" the SPD. (D. Harrington Dep. at 21.) By their own admissions, plaintiffs have failed to prove reliance, an essential element of their claim based on the SPD language. Therefore, defendant Stolz's motion for summary judgment on this claim must be allowed. *See EEOC v. Clay Printing Co.*, 955 F.2d 936 (4th Cir.1992) (affirming summary judgment where plaintiff failed to produce evidence, court relied on plaintiffs' admissions that they could not offer evidence to support element of claim).

c. Fiduciary Duty as a Director and Officer

Plaintiffs assert that Stolz was a fiduciary under ERISA, thereby owing a fiduciary duty to them, simply because he was an officer and director of Cannon. The Fourth Circuit has held that "fiduciary status is not an all-or-nothing concept." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 61 (4th Cir.1992) *cert. denied*, ___ U.S. ___, 113 S.Ct. 1051, 122 L.Ed.2d 359 (1993). The facts of this case, indicated that Stolz was a fiduciary for limited purposes, none of which are relevant to plaintiffs' claims.

The ERISA definition of fiduciary as set out in the discussion of defendant Fieldcrest's motion applies equally to defendant Stolz. *See* 29 U.S.C. § 1002(21)(A). The Fourth Circuit has said that plan documents are the place to look in order to determine the discretionary authority and responsibility given to board members. *Coleman*, 969 F.2d at 61. The Court of Appeals continued to explain that one should also look "beyond the formalities to see if [the alleged fiduciary] in fact exercised authority" such that he was acting as a fiduciary. *Id.* Looking first to the Plan's language, the only duty given to the board was that of appointing members of the Retirement Committee. Stolz has stated that his involvement with respect to the Plan was limited to voting for Retirement Committee members and there has been no evidence suggesting otherwise. Stolz was never on the Retirement Committee himself and there are no facts indicating that he exercised any authority or control respecting the management or disposition of the Plan, nor was he ever involved in the administration of the Plan.

Plaintiffs' contention that Stolz assumed an expanded fiduciary role simply due to his status as an officer and director is without merit. As the Fourth Circuit stated, the extent of a fiduciary's role is to be gleaned from plan-related documents. *Id.* The Third Circuit has specifically held that one's position within a company does not create a fiduciary duty. *See Confer v. Custom Eng. Co.*, 952 F.2d 41 (3rd Cir.1991). This position is also supported by commentary found in the Code of Federal Regulations where it states that members of the board of directors and those holding office in a company are fiduciaries only to the extent that they have responsibility for the acts described in the statute. 29 C.F.R. § 2509.75-8 (D-4, D-5) (1994).

Stolz, admittedly, was a fiduciary for the limited purpose of selecting members of the Retirement Committee. However, there is no evidence that he breached this duty. Stolz's motion with respect to the breach of fiduciary duty claim will be allowed.

2. *Conspiracy Claim Against Stolz*

Plaintiffs claim that Stolz and other Cannon directors conspired to breach fiduciary duties under ERISA. The Supreme Court has described ERISA as a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980), and nowhere does it provide for a conspiracy cause of action. In a recent case, the Court cast doubt on the availability of a conspiracy claim under ERISA. *See Mertens v. Hewitt Assocs.*, ___ U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). In that case, the court rejected a claim against an actuarial firm that allegedly aided and abetted

a breach of fiduciary duty stating that it was unwilling "to infer causes of action in the ERISA context, since that statute's carefully and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Id.*, ___ U.S. at ___, 113 S.Ct. at 2067 (citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985)) (emphasis in original).

Applying the reasoning of *Mertens*, plaintiffs cannot make a claim for conspiracy under ERISA. The statute does not prohibit anyone from "conspiring" with a fiduciary for any purpose, just as it does not prohibit "aiding and abetting" the breach of a duty. *See Reich v. Rowe*, 20 F.3d 25 (1st Cir.1994) (no cause of action against non-fiduciary who knowingly participated in breach of ERISA fiduciary).

Even if the court were to infer a conspiracy cause of action within ERISA, plaintiffs have failed to establish facts to support a conspiracy. To state a claim for conspiracy a plaintiff must establish: (1) an agreement between two or more people to participate in an unlawful act or a lawful act in an unlawful manner; (2) an unlawful overt act by a party to the agreement that is in furtherance of the agreement; and, (3) damages. *Davenport v. North Carolina Dept. of Transportation*, 3 F.3d 89 (4th Cir.1993). When asked to provide factual data supporting the existence of a conspiracy, plaintiffs responded with conclusory responses that showed nothing. Stolz, however, has stated that as of the time of the 1979 Amendment, he had never heard of Murdock and had never discussed the retirement plan. (Stolz Aff. para. 8, 9.) As well, it is

undisputed that Stolz left Cannon in May 1982 and was not involved in or aware of the decision to terminate the Plan or to select Executive Life as an annuity provider. The law is clear that mere allegations of a conspiracy do not establish a claim and are insufficient to overcome a motion for summary judgment based on testimony evidencing a lack of participation. *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987) (quoting *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir.1985)). Defendant Stolz's motion for summary judgment on the conspiracy claim will be allowed.

3. *Interference With Employment Relationship Claim*

Plaintiff's [sic] final claim against Stoltz [sic] is that his actions relating to the amendment of the Plan violated § 510 of ERISA which prohibits the firing or harassing employees to prevent them from claiming vested pension rights. Section 510 is relevant in situations where there is an allegation that "an employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way." *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir.1990). Plaintiffs have not offered the court any evidence that Stolz interfered with the employer-employee relationship between Cannon and Plan participants, or that any of his actions resulted in a change in this relationship. Section 510 has been interpreted as a safeguard of the employment relationship that gives rise to an employee's individual rights. *See West v. Butler*, 621 F.2d 240 (6th Cir.1980);

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). As a matter of law, this section does not apply to the facts established in this case and Stolz's motion with respect to this claim will be allowed.

C. The Directors' Motion for Summary Judgment

Plaintiffs' claims against the Directors are very similar to those made against Stolz and much of the discussion concerning Stolz's motion for summary judgment applies equally to the motion of the Directors. Specifically, plaintiffs' claim that the Directors were fiduciaries merely because of the position they held is without merit for the reasons discussed in reference to the same claim made against Stolz. Plaintiffs have failed to provide the court with any evidence that any of the Directors exercised any discretionary control or authority over the administration of the Plan such that their roles as Directors extended into that of fiduciary. As was Stolz, the Directors were fiduciaries for the limited purpose of electing members of the Retirement Committee,[6] and plaintiffs have not shown that the Directors took any action in breach of this duty.

Plaintiffs further contend that the Directors' power to amend or terminate the Plan made them fiduciaries. The Fourth Circuit, however, has held that the ability to alter or terminate a plan is not to be reviewed by fiduciary

---

[6] Director Batte was a member of the Retirement Committee and plaintiffs' claims against him in that capacity will be addressed elsewhere in this Order.

standards. *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 411 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984). Several other circuits are in agreement. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir.1990); *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); *Young v. Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.1988); *cert. denied*, 488 U.S. 981, 109 S.Ct. 529, 102 L.Ed.2d 561 (1988); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (8th Cir.1987); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418 (9th Cir.1986). Also, the Ninth Circuit has already reviewed the Plan at issue in this case in *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406 (9th Cir.1988) (*ACTWU*), and the amendment, termination and reversion of surplus assets were all determined to be in compliance with ERISA. Thus, in following the terms of the Plan, the Directors were not in violation of ERISA, and the Directors' motion for summary judgment as to the breach of fiduciary duty claims will be allowed.

The discussion in the section of this Order resolving Stolz's motion for summary judgment on plaintiffs' allegations that the 1979 Amendment to the 1976 Plan was a breach of fiduciary duty and the Plan itself is fully relevant to the same claims made against the Directors. For the reasons stated above, the court is of the opinion that the amendment was not in violation of ERISA or its own terms. Additionally, the court's reasoning relating to plaintiffs' claims that the SPD gave them additional rights and created fiduciary duties owed them by Stolz also applies to the same claims against the Directors.

Plaintiffs allege that the Directors were part of a conspiracy to deprive them of benefits and also violated § 510 of ERISA. For the reasons articulated in the discussion of the similar claims as they relate to Stolz, the Directors' motion for summary judgment will be allowed with respect to the conspiracy and interference with the employment relationship claims.

Because Director George A. Batte, Jr. (Batte) was also a member of the Retirement Committee, the claims against him warrant independent discussion. The minutes of the 30 April 1979 Retirement Committee meeting reveal that Batte was on the Committee.[7] No other records indicate his committee service prior to that date. Batte left Cannon in 1982. The dates are important to note because plaintiffs' allegations of any wrongdoing relating to the Retirement Committee stem from committee actions taken after Batte left Cannon. While Batte may have had additional fiduciary duties during the time he served on the Retirement Committee, plaintiffs have failed to allege or prove that he took any action in violation of such duties.

D. Murdock's Motion for Summary Judgment

Plaintiffs' claim [sic] against Murdock are similar to those lodged against the other defendants and include breach of fiduciary duty in amending the Plan, in terminating the Plan, in selecting Executive Life as the annuity

---

[7] Batte has no independent recollection of serving on the Retirement Committee; however, he did not deny that he could have served on the Committee at some point in time.

carrier and claiming the surplus assets; conspiracy; prohibited transactions under ERISA and interference with the employer-employee relationship. Although the claims are similar, some facts apply to Murdock's involvement with the Plan that were not relevant to other defendants and a brief recitation of them will facilitate discussion.

Murdock first bought stock in Cannon in 1980 and acquired a controlling interest in March 1982. At that time he became Chief Executive Officer and served in that capacity until January 1986. During these years he was also the sole shareholder of Cannon Holding Corporation (CHC), Cannon's parent company.

In November 1985 Fieldcrest expressed interest in acquiring Cannon and the sale was completed on 30 January 1986. Fieldcrest has made it clear from the beginning that it had no desire to purchase Cannon's retirement plan and the Plan was not part of the sale. As a result, the decision was made to terminate the Plan. To facilitate termination, the Plan was amended with the changing of the sponsor from Cannon to CHC, which Murdock would still control after the sale. The Plan was also amended to provide for the reversion of all surplus assets to the sponsor.

As Plan sponsor, CHC, through Murdock, was responsible for distribution of Plan assets. CHC formed a Retirement Committee (the Committee) to oversee asset distribution. The Committee members were Michael Werner, James Tatom, Michael Halpern and Raymond Henze. They, with the assistance of the law firm of O'Melveny and Myers and the actuarial firm of Hewitt and Associates, had the responsibility of assuring that all

participants would receive full benefits. After several rounds of bidding and financial stability reviews, Executive Life was chosen as the annuity carrier. Executive Life administered the annuity without incident until it was placed in conservatorship in 1991. Plaintiffs have testified that they have received all benefits owed them by the Plan. (Johnsie Riley Dep. at 54; John Riley Dep. at 35-36; V. Harrington Dep. at 50-51; D. Harrington Dept. [sic] at 28-29.)

1. Res Judicata

Murdock was a named defendant in *ACTWU*, a case filed by the Union and individual former Cannon employees and Plan participants. The complaint sought relief for all Plan participants and alleges breach of fiduciary duty in management, amendment and termination of the Plan. Defendant Murdock alleges that disposition of *ACTWU* operates to invoke the doctrine of res judicata and bar plaintiffs' claims against him.[8]

---

[8] Defendant Fieldcrest was also involved in the *ACTWU* suit and argued res judicata and collateral estoppel as grounds for dismissal at the pleading stage of the instant action. In its Order of 30 July 1993, the court concluded that the issues raised in *ACTWU* and those presented in this action, as they relate to Fieldcrest, were not identical. Relying on the "issue preclusion" analysis of *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir.1992), the court held that collateral estoppel did not apply. The res judicata argument now raised by Murdock focuses on the similarity of the claims and parties rather than the issues and is a separate and distinct argument from that rejected in the earliest Order.

For res judicata to apply, three elements must be proven: "(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of the parties or their privies in the two suits." *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir.), *cert. denied*, 498 U.S. 900, 111 S.Ct. 257, 112 L.Ed.2d 215 (1990) (quoting *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.1981)). Addressing the first element, Murdock is correct in his assertion that the settlement and voluntary dismissal of *ACTWU* on remand from the Ninth Circuit was a final judgment on the merits for the purposes of the first element of res judicata. *See id.*, 900 F.2d at 740.

Turning to the second element, the causes of action in *ACTWU* and the instant case are not identical. Where the elements of claims differ, there are two causes of action and litigation of one will not preclude litigation of the other. *United States v. Tatum*, 943 F.2d 370, 381 (4th Cir.1991). This court has previously held that *ACTWU* involved claims which related to facts that did not take place at the same time as those involved in the case at bar. *Riley v. Murdock*, 828 F.Supp. 1215, 1222-23 (E.D.N.C.1993). Specifically, the *ACTWU* plaintiffs did not file claims relating to the surplus prior to 1979, the 1979 Plan amendment, the language of the 1976 and 1979 SPD's, allegedly prohibited transactions under ERISA, the selection of Executive Life, or the allocation of surplus assets at termination.

Examining the third and final element of res judicata requires looking at the identity of the parties and their privies in both suits. Murdock admits, and the plaintiffs have stated, that they were not plaintiffs in *ACTWU* and

were not members of the union that filed that suit. Therefore, the focus shifts to the relationship between the *ACTWU* plaintiffs and those here. This court held, in its previous order, that the plaintiffs in the instant case "are not so closely aligned with plaintiffs in *ACTWU* as to justify precluding this litigation." *Id.*, 828 F.Supp. at 1223. Relying on this earlier decision, the court finds that there is no privity between the two groups of plaintiffs so as to satisfy the third element of res judicata. Because only one of the three necessary elements of res judicata are present in this case, that doctrine will not apply to bar this action against Murdock and the discussion will proceed to the merits.

2. *Breach of Fiduciary Duty*

Plaintiffs have alleged that Murdock breached the fiduciary duties owed by the role he played in several events. Each event will be examined separately.

a. Purchase of the Executive Life Annuity

The heart of plaintiffs' allegations against Murdock are that the purchase of the group annuity contract from Executive Life in 1986 constituted a breach of fiduciary duty. Murdock was a fiduciary under ERISA, and the duties of a fiduciary are established in 29 U.S.C. § 1104, which provides, in pertinent part:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

> (A) for the exclusive purpose of:
>
> (i) providing benefits to participate [sic] and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . [9] [and]
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Plaintiffs claim Murdock violated the "exclusive purpose" requirement, the "prudence" requirement, and the "in accordance with the plan" requirement. Each requirement will be examined in turn.

Courts have articulated two way [sic] in which to measure a fiduciary's use of prudence in carrying out their duties. The first is whether the fiduciary employed the appropriate methods to diligently investigate the transaction and the second is whether the decision ultimately made was reasonable based on the information resulting from the investigation. *See Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487 (8th Cir.1988); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir.1983), *cert. denied*, 464 U.S.

---

[9] Part C of this statute requiring diversification is not at issue in the instant case.

1040, 104 S.Ct. 704, 79 L.Ed.2d 169 (1984); *Bidwell v. Garvey*, 743 F.Supp. 393 (D.Md.1990).

In determining if the appropriate investigation was conducted, courts often focus on whether the fiduciary obtained assistance from experts. *See Donovan v. Cunningham*, 716 F.2d 1455, 1474 (5th Cir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984) ("ERISA fiduciaries need not become experts . . . [as] they are entitled to rely on the expertise of others.") From this point, the court's inquiry shifts to whether the fiduciary's decision was reasonable at the time it was made in light of the results of the investigation. This test is not one of hindsight and facts taking place after the decision was made will not render a decision imprudent. In a case out of the Eleventh Circuit where the fiduciaries' decision to develop plan-owned property turned out to be a bad one, the court made it clear that it had the duty to inquire whether the fiduciaries "at the time they engaged in the challenged transaction, employed the appropriate methods to investigate and/or structure the investment." *Donovan v. Walton*, 609 F.Supp. 1221, 1228 (S.D.Fla.1985), *aff'd sub nom., Brock v. Walton*, 794 F.2d 586 (11th Cir.1986).

Applying these measures of prudence to Murdock's decision to purchase the Executive Life annuity, it is clear that the decision was well-investigated and reasonable at the time it was made. It is undisputed that as soon as termination of the Plan was decided upon, a committee of experienced financial managers was formed and charged with the responsibility of evaluating potential carriers and selecting the one they felt to be the best. This committee, as explained elsewhere in this Order, retained

Hewitt Associates, a leading employee benefits consulting firm, and began going through a list of the top-rated insurance companies. (Werner Dep. at 140.) The committee also retained a law firm and conducted its own investigation of each insurance company that bid on the annuity contract. This investigation included: (1) a financial analysis; (2) personal contact with the companies' senior management; (3) a review of financial statements, quarterly reports and other relevant financial documents (Werner Dep. at 102-03, 160; Tatum Dep. at 41, 47); (4) consultation with Conning & Company, a firm specializing in the evaluation of insurance companies (Werner Dep. at 150-51); (5) consulting with independent sources about Executive Life; and, (6) consulting with other companies that had bought annuity contracts from Executive Life. The committee also relied on the fact that Executive Life had received a high rating in 1986 from A.M. Best, the preeminent authority rating insurance companies. (Thrower Dep. at 26, 44-45, 65, Ex. 21.) The committee also knew that Executive Life received a AAA rating from Standard & Poor's, the highest rating that company gives, and the stock of its parent company was also highly rated. (*Id.* Ex. 69.) The committee also made certain that Executive Life had the administrative capabilities to oversee disbursement of Plan funds. (Werner Dep. at 175-77).

All of these efforts establish that Murdock and his committee thoroughly investigated the purchase of the annuity from Executive Life and that the decision to purchase was reasonable based on the results of that investigation. Plaintiffs rely on the assertions of their expert that Murdock should have known in 1986 that there were problems at Executive Life which would lead

to its receivership in 1991. (Babbel Dep. at 73, 75.) However, the mere conclusory opinion of an expert, when not supported by evidence, will not defeat summary judgment. *Tyger Constr. Co., Inc. v. Pensacola Construction Co.*, 29 F.3d 137 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995); *Eastern Auto Distribs., Inc. v. Peugeot Motors of Am.*, 795 F.2d 329 (4th Cir.1986). Plaintiffs have not offered any evidence to support the opinion that Murdock and the committee should have known of any problems at Executive Life in 1986. Therefore, the purchase of the Executive Life annuity was prudent.

Plaintiffs claim that Murdock violated another requirement imposed upon an ERISA fiduciary in that he did not follow what is known as the "exclusive purpose" clause. Examining the "exclusive purpose" requirement under ERISA's outline of fiduciary duties, it is clear that the statute imposes a loyalty to plan participants and beneficiaries. However, the legislative history of the statute suggests that Congress intended a fiduciary to be able to meet the "exclusive purpose" requirement by satisfying the prudence requirement. H.R.Conf.Rep. No. 1280, 93rd Cong., 2nd Sess.1974, *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5083. Additionally, courts have held that a fiduciaries' decision based on the advice of retained experts did not violate the duty of loyalty. *See Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982). Murdock acted for the exclusive purpose of Plan participants and beneficiaries when he prudently selected to purchase the annuity from Executive Life.

The third requirement mandates that a fiduciary administer a plan in accordance with plan documents, unless doing so would violate ERISA. Section 1408 of the Plan, as amended, allocated administrative responsibilities to the Sponsoring Committee, the Retirement Committee, the Trustee, and the Investment Committee. Murdock was not a member of any of these committees, was not the Trustee, and there are no facts to suggest that he participated in Plan administration. However, even if it were determined that he participated in Plan administration, he would not be liable because of such participation because the Plan was administered in accordance with its terms. The Plan in effect when Murdock took control provided for the reversion of surplus assets to the Plan sponsor upon termination. (1979 Plan § 11.05.) The Committee had to transfer the surplus assets to Murdock when the Plan was terminated in 1986 or else be liable for an ERISA violation. Thus, Murdock cannot be held liable on this basis.

b. The 1985 Plan Amendment and Termination

In 1985, the Plan was amended to change the name of the sponsor from Cannon to CHC. The amendment also eliminated the phrase "due to erroneous actuarial computation" in reference to the reversion of surplus assets. Several courts have considered this phrase to be boilerplate language and have held that it does not require that surplus assets be the result of an identifiable mistake, but allows any assets remaining after all plan liabilities are satisfied to labeled [sic] the result of actuarial error. *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848

F.2d 1164 (11th Cir.1988); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America v. Dyneer Corp.*, 747 F.2d 335 (6th Cir.1984); *See* Rev.Rul. 83-52, 1983-13 C.B. 87. Thus, the elimination of the phrase concerning actuarial computation was not a material change and had no effect on the benefits owed plaintiffs. The change of the sponsor was also an incidental change with no effect on the participants or beneficiaries. Neither of these amendments form the basis of a breach of fiduciary duty claim.

Plaintiffs contend that the termination of the Plan was a breach of fiduciary duty; yet, several circuits have held that termination of plans are not evaluated under fiduciary standards. *Hozier*, 908 F.2d at 1155; *Musto v. Am. General Corp.*, 861 F.2d 897 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989). In fact, the Ninth Circuit has made this determination about the very plan at issue in this case. *ACTWU*, 861 F.2d at 1419. The Fourth Circuit has not decided a case involving the application of fiduciary standards to termination of a plan, but it has heard a case involving fiduciary standards, renegotiation and amendment of a plan. In *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 411 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), the court stated that Congress did not prohibit "an employer who is a fiduciary from exercising the right accorded other employers to renegotiate or amend [plan terms]. . . . The changes, accomplished in this manner, are not to be reviewed by fiduciary standards." Termination of a plan is similar to the changes in *Sutton* and, therefore, the decision to terminate should not be evaluated under fiduciary standards. Because the

decision to terminate is not evaluated under fiduciary standards, there can be no claim of breach of fiduciary duty with respect to that action.

c. Allocation of Surplus Assets

Plaintiffs claim that Murdock and the other defendants[10] violated 29 U.S.C. § 1344 and breached their fiduciary duties by turning over the surplus assets of the Plan to Murdock. Title 29 U.S.C. § 1104, discussed in detail above, outlines fiduciary duties and specifically references § 1344, which deals with plan termination. Section 1104 allows plan assets to "inure to the benefit of" the employer, as provided in § 1344. By definition, any allocation of plan assets which complies with § 1344 cannot be a breach of fiduciary duty. The only issue then is whether payment of the surplus to Murdock was in compliance with § 1344.

Section 1344(d)(1) allows for the reversion of surplus assets to the employer, if a plan so provides. There is no dispute that the Plan provides such a reversion and plaintiffs have failed to present any evidence that any defendant did not distribute the Plan assets in compliance with the statute and the Plan. In fact, the only evidence relating to the disbursement of assets indicates that everything was done properly. Application was made to the

---

[10] This claim is made against all defendants, but is discussed in reference to Murdock's motion because the claim centers around the theory that the payment of the surplus assets to him was the violation. This discussion should apply to the motions of the other defendants as well.

Pension Benefits Guaranty Corporation (PBGC)[11] for a Notice of Sufficiency regarding the termination of the Plan. PBGC then questioned Hewitt, the actuarial firm calculating asset distribution, about the allocation of assets between the sponsor and the participants. The allocation was done in compliance with PBGC regulations and all eligible Plan members received a pro rata share of the surplus, with the remainder going to the sponsor. *See* 29 C.F.R. §§ 2618.30, 2618.31. Ultimately, the PBGC issued a Notice of Sufficiency, signifying its approval of the asset allocation. The only evidence plaintiffs offered to counter these facts is the statement of an expert confirming that the method used to calculate the allocation is the "preferred" method. The surplus assets were not distributed in violation of § 1344 and the distribution was not a breach of fiduciary duty. Defendants' motions relating to this claim will be allowed.

3. Conspiracy to Violate ERISA

Plaintiff's [sic] contend that Murdock conspired with the Cannon Board of Directors to pass the 1979 Amendment allowing any surplus assets to revert to the Plan sponsor. All facts indicate, however, that Murdock had no contact with Cannon prior to 1980 and did not have a controlling interest until March 1982. In fact, individuals who were either officers or directors of Cannon during 1979 have sworn that they never spoke with Murdock or his associates prior to February 1980. (Adams Dep. at

---

[11] The PBGC is the federal agency responsible for regulating and overseeing qualified pension plans.

65-66; Stoltz [sic] Dep. at 24-25.) Murdock himself has stated that he was not part of any such conspiracy and was attracted to Cannon because of its vast real estate holdings and knew little, if anything, about its retirement trust. (Murdock Dep. at 34.) Plaintiffs have failed to produce any facts in support of Murdock's involvement with the 1979 Amendment. Further, as stated above in relation to plaintiffs' claims against several other defendants, the Supreme Court has cast serious doubt on the existence of a conspiracy cause of action under ERISA. *Mertens*, ___ U.S. at ___, 113 S.Ct. at 2063 (1993). For these reasons, Murdock's motion for summary judgment on any conspiracy claim will be allowed.

4. Prohibited Transaction Claim

Plaintiffs make this claim against several defendants, including Murdock, and it is discussed here because the factual basis of the claim is that the purchase of the Executive Life annuity, which took place under Murdock's leadership, was a violation of 29 U.S.C. § 1106. That statutes [sic] prohibits fiduciaries from taking part in certain specified transactions involving assets of a plan and the Fourth Circuit has written that "Congress enacted a prohibited transaction rule to prevent persons with a close relationship to a plan from using that relationship to the detriment of the plan beneficiaries." *Wood v. Commissioner*, 955 F.2d 908, 910 (4th Cir.1992). Examining the language of § 1106, it is clear that a prohibited transaction must involve a plan and a "party in interest." Under plaintiffs' scenario, the only entity involved, other than the Plan itself, is Executive Life. Executive Life

cannot be said to be a party in interest, as it had no interest in the Plan prior to it being awarded the annuity contract. In a case similar to the one at bar, the Ninth Circuit held that the purchase of a group annuity as a part of plan termination was not the type of transaction intended to be prohibited by this statute. *Waller v. Blue Cross of California*, 32 F.3d 1337 (9th Cir.1994). Defendants' motion on this claim will be allowed.

5. Interference With Employment Relations Claim

This claim was also made against other defendants and is completely discussed in relation to defendant Stolz. That discussion applies equally to defendant Murdock, as plaintiffs have failed to present any evidence that their employment relationship was changed in any way due to his actions. Murdock's motion with respect to this claim will be allowed.

III. CONCLUSION

For the reasons herein stated, the motions for summary judgment filed by Fieldcrest, Stolz, the Directors, and Murdock are ALLOWED and this matter is DISMISSED. Plaintiffs' motion for class certification is hereby rendered MOOT.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 28, 1996

No. 95-2414
CA-92-442-5-BR

JOHNSIE RILEY, on behalf of herself and all others similarly situated; JOHN F. RILEY, on behalf of himself and all others similarly situated; VIRGINIA HARRINGTON, on behalf of herself and all others similarly situated; DEWEY HARRINGTON, on behalf of himself and all others similarly situated

Plaintiffs – Appellants

v.

DAVID H. MURDOCK; DHM HOLDING CORPORATION; MURDOCK INVESTMENT CORPORATION; PACIFIC HOLDING CORPORATION; CANNON HOLDING CORPORATION; CABARRUS BANK & TRUST COMPANY, Trustee

Defendants – Appellees

and

FIELDCREST CANNON MILLS, INCORPORATED; CHARLES A. CANNON, Charitable Trust Number One; CHARLES A. CANNON, Charitable Trust Number Two; CHARLES A. CANNON, Charitable Trust Number Three; CANNON FOUNDATION, INCORPORATED; TRUST UNDER THE WILL OF CHARLES A. CANNON; WILLIAM C. CANNON, Estate of the foregoing, individually and as a trustee; GEORGE A. BATTE, JR., individually and as a trustee; J. HARRIS CANNON, individually and as a trustee; OTTO G. STOLZ, individually and as a trustee; HAROLD P. HORNADAY; DONALD S. HOLT, Estate of the foregoing; ANDREW W. ADAMS; ALBERT

M. ALLRAN; JOSEPH C. RIDENHOUR; HUBERT J. TOUMEY; JAMES R. JOLLY; FIRST UNION NATIONAL BANK, Trustee

Defendants

SECRETARY OF LABOR

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK